United Nations AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1049

Case No. 1110: HANDLING

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Omer Yousif Bireedo;

Whereas, on 22 September 1999, Ulf Harald Handling, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 November 1999, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal to:

"...

2. Consider that the decision not to renew the Applicant's fixed-term contract was arbitrary.

3. Consider that there existed legal expectancy of renewal with respect to the Applicant's contract.

4. Consider that the right of the Applicant to due process and respect of his dignity and integrity has been violated.

5. Recommend therefore as remedy.

- that the Applicant be granted US$ 250,000 as compensation for the non renewal of his contract;
- that the Applicant be granted US$ 300,000 as a compensation for the violation of his right to due process and respect of his dignity and integrity;

- that the Applicant be offered a D1 position within the [United Nations] system in Geneva;

- that the Applicant be given a certificate of duty;

- that the Applicant's costs be paid by the [United Nations Compensation Commission (UNCC)];

- any additional compensation that the Tribunal may deem appropriate."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2000 and periodically thereafter until 30 June 2001;

Whereas the Respondent filed his Answer on 12 June 2001;

Whereas the Applicant filed Written Observations on 21 December 2001;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a one-year fixed-term appointment as Chief, Information Systems Section (ISS), UNCC, Geneva, at the P-5 level, on 21 August 1994. His appointment was subsequently extended twice, until his separation from service on 31 December 1996.

On 4 November 1996, the Executive Secretary, UNCC, informed the Applicant that his contract would not be renewed beyond its expiration, on 31 December 1996. Furthermore, he was informed that effective immediately, he was discharged of his responsibilities as Chief, ISS, UNCC, though he would continue to be employed until 31 December. Additionally, his access to the premises of UNCC was limited to the extent required to retrieve his personal belongings, on which occasion he would be required to obtain the written permission of the Executive Secretary, UNCC, or his deputy prior to entering the premises and he would be accompanied by a UNCC security officer. The Applicant was escorted out of the building by a security officer.

On 5 November 1996, the Executive Secretary, UNCC, informed a number of computer companies that the Applicant had been replaced effective 4 November 1996.

On 10 November 1996, the Applicant requested the Secretary-General to review the decisions not to renew his contract and to discharge him of his responsibilities as Chief, ISS, UNCC. He also requested suspension of action.

On 18 November 1996, the Applicant submitted an appeal to the Joint Appeals Board (JAB) requesting suspension of action on these administrative decisions. In its report of 28 November 1996, the JAB, Geneva, noted that the decision not to renew the Applicant's contract upon its expiration on 31 December 1996 had yet to be implemented and that as he did not have an expectancy of renewal of his fixed-term appointment, this decision would not cause the Applicant irreparable harm. Regarding the decision to discharge the Applicant of his responsibilities, the JAB noted that as this decision was taken by the Executive Secretary, UNCC, who did not have the authority to do so, this administrative decision could not be implemented. Accordingly, the JAB recommended that the request for suspension of action, in respect of the decision to discharge the Applicant from his responsibilities as Chief, ISS, UNCC, be granted until the expiration of his contract.

On 9 December 1996, the Executive Secretary, UNCC, requested the Assistant Secretary-General for Human Resources Management to retroactively approve the placement of the Applicant on special leave with full pay (SLWFP) from 4 November to 31 December 1996. The latter approved same, "in view of the exceptional circumstances", the following day.

On 11 December 1996, the Under-Secretary-General for Management, advised the Applicant that the Secretary-General concurred with the JAB's conclusion regarding the non-renewal of the Applicant's appointment but did not accept the JAB's recommendation regarding the suspension of action concerning the decision to place him on SLWFP.

On 1 April 1997, the Applicant lodged an appeal on the merits with the JAB. The JAB adopted its report on 24 March 1999. Its considerations, conclusions and recommendations read, in part, as follows:

"**Considerations**

...

36. The Panel was ... of the opinion that having an appointment renewed twice could not substantiate *per se* a claim for expectancy of renewal. ...

...

38. No Performance Evaluation Report (PER) was included in the Appellant's Official Status File but ... recalling that "a legal expectancy of renewal would not be created by efficient or even by outstanding performance", the Panel considered that inquiring further in this respect was not necessary.

39. The Panel ... examined the Appellant's claim that the decision not to renew his fixed-term appointment was arbitrary. ... The Appellant did not present evidence in this respect and the Panel considered that he had not met his burden of proof.

...

41. An exchange of e-mails, at the beginning of 1996, between the Appellant and the person in charge of the Claims Payment section, indicated *prima facie* to the Panel that the Appellant did not participate to the extent that might have been expected of a senior staff member...

...

43. The Panel was of the opinion that the surrounding circumstances of the Appellant's separation from service did not indicate arbitrariness or an expectancy of renewal. Problems existed with ISS services and people were resigning because of the uncertainty surrounding their contracts with UNCC. In this respect, the Panel considered that there was no evidence ... to hold the Appellant responsible for those resignations ...

44 The Appellant ... maintained that [his] placement ... on SLWFP was "null and void in substance" as the Executive Secretary did not have the authority to do so. While conceding that the Executive Secretary lacked the necessary authority and that the appropriate official should have considered the matter before its implementation, the Panel noted that such consideration, albeit *a posteriori*, took place. Furthermore, the Panel considered that no prejudice to the Appellant could be discerned and that the Assistant Secretary-General for Human Resources Management, in subsequently approving the Executive Secretary's decision, corrected whatever procedural irregularity might have been entailed originally.

45. ... [T]he Appellant claimed that letters sent to computer companies and to UNCC staff damaged his career prospects and his reputation. ..., the Panel found that it was a simple statement of fact about the appointment of a new head of the unit and that it contained no language prejudicial to the Appellant. ...

46. Finally ... the Panel considered that while the confidentiality of UNCC information warranted security measures, they could have been carried out with greater sensitivity shown to the Appellant.

Conclusions and Recommendations

47. For the foregoing reasons the Panel **concludes** that:

a. the decision not to renew the Appellant's fixed-term contract was not arbitrary; and

b. there existed no legal expectancy of renewal with respect to the Appellant's contract.

48. As a result, the Panel **recommends** to the Secretary-General that the present appeal be rejected.

Special Remark

49. The Panel wishes to draw the attention of the Secretary-General to the following issue. In situations where senior managers have to deal with emergency situations where the continued presence of certain staff members is deemed to pose an unacceptable risk to the interests of the Organization, *e.g.* where the protection of sensitive or confidential information - especially if stored in electronic databases - is vulnerable, the relevant manager should have the appropriate authority to act promptly. This was not so in this case.

Additionally, it is important to ensure that in exercising this authority senior managers balance the need for such emergency measures against the right of staff members to due process and respect of their dignity and integrity. Accordingly, the Panel feels that it would be in the Organization's interest to draw up guidelines to enable senior management to act promptly but with sensitivity towards staff members who may be judged to pose an *ex ante* risk to the interests of the Organization. At the same time it should be stressed that such threats must be assessed realistically and not be used as a blanket excuse for peremptory action by senior managers."

On 25 June 1999, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to take no further action on his appeal.

On 19 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's fixed-term contract was arbitrary.

2. There existed a legal expectancy of renewal of the Applicant's contract.

3. The Applicant's right to due process and respect for his dignity and integrity was violated.

Whereas the Respondent's principal contentions are:

1. The Applicant had no expectancy of renewal of his appointment.
2. The non-renewal of the Applicant's contract was not arbitrary.
3. Initial procedural flaws were corrected and the Applicant suffered no prejudice.

The Tribunal, having deliberated from 28 June to 23 July 2002, now pronounces the following Judgement:

I. The Applicant contests the Respondent's decision not to renew his fixed-term appointment, claiming that he had a reasonable expectancy of renewal of his contract. The Applicant bases his claim on the fact that his contract had been renewed twice, verbal assurances of further renewal were given to him and his performance was outstanding. The Tribunal, having examined the Applicant's claim, finds that the circumstances of the case do not support the claim and that the Respondent acted within his discretion and authority when deciding not to renew the Applicant's fixed-term appointment.

II. Staff rule 104.12 (b) (ii) provides that "[t]he fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment". This is also stated very clearly in the Applicant's letter of appointment, dated 30 January 1996. Furthermore, in its jurisprudence, the Tribunal has held that employment with the Organization ceases on the expiration date of the fixed-term contract and that prior renewals, verbal promises and outstanding performance do not create a legal expectancy of renewal. In its Judgement No. 578, *Hassani* (1992) the Tribunal stated that: "a fixed-term appointment normally ends on its expiration date, and prior renewals cannot create, ... a legal expectancy of renewal ...". And in Judgement No. 440, *Shankar* (1989) the Tribunal held that "a claim to renewal, to be valid, must be based not on mere verbal assertions unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case". In the present case, the Applicant claims to have been given to understand that his contract would be renewed as long as

he would be willing to stay with UNCC. However, the Applicant provided no evidence of such assertions.

As for the Applicant's claim of outstanding performance as a justification for his expectation of renewal of his contract, the Tribunal notes that there was no performance evaluation report (PER) in his official status file. This notwithstanding, in keeping with the Tribunal's jurisprudence, a legal expectancy of renewal is not created by efficiency or even by outstanding performance. (See Judgements *Shankar* (*ibid.*) and No. 205, *El-Naggar* (1975).)

Under the circumstances, the Tribunal finds that the Applicant had no legal expectancy of the renewal of his appointment.

III. The Respondent in his Answer provides two reasons that led to the decision not to renew the Applicant's appointment:

a. A morale crisis within ISS, resulting in the resignation of key staff, and

b. Complaints from the principle users of ISS services regarding the Applicant's contribution to their work.

The Tribunal noted that the JAB found in various e-mail communications a *prima facie* indication that the Applicant was not contributing to the Unit's work at the level expected of a senior staff member.

Regarding problems of resignations of some members of ISS, the Tribunal is in agreement with the JAB's findings that there was no evidence to hold the Applicant responsible for those resignations. In fact, several staff members who resigned mentioned having good working relationships with the Applicant, as well as with other ISS staff members.

Notwithstanding the foregoing, the Tribunal acknowledges that ultimately it was the responsibility of the Executive Secretary, UNCC, to decide whether it was in the best interest of the Organization not to renew the Applicant's appointment as Chief of ISS. However, that decision may not be taken arbitrarily.

IV. The Applicant claims that the decision not to renew his fixed-term appointment was arbitrary.

The Tribunal has consistently held that the burden of proving prejudice or other improper motivation rests with the Applicant. (See Judgement No. 613, *Besosa* (1993), citing Judgement No. 93, *Cooperman* (1965).) The Applicant in the present case failed to present any evidence to support his claim and therefore did not discharge the required burden of proof. Thus, the Tribunal finds that the non-renewal of the Applicant's fixed-term appointment was not arbitrary.

V. The Applicant contends that placing him on SLWFP was "null and void in substance" as the Executive Secretary, UNCC, did not have the authority to do so. While conceding that the Executive Secretary, UNCC, lacked the necessary authority and that the appropriate official should have considered the matter before its implementation, the Tribunal took note of the fact that the Assistant Secretary-General for Human Resources Management subsequently approved the Executive Secretary's decision.

VI. Having said this, the Tribunal is concerned that an unauthorized official in the United Nations system had made such an important decision, which carried serious consequences to the Applicant, and that the appropriate official considered the matter only *a posteriori*.

Furthermore, the Tribunal is disturbed by the circumstances which followed the Applicant's discharge from his duties: the Applicant was requested to leave the UNCC premises accompanied by a security guard, during lunch time, causing irreparable damage to his reputation and future career.

Moreover, the Tribunal does not agree with the conclusion of the JAB that the letter sent by the Administration to computer companies and to the UNCC staff was a simple statement of facts, informing the addressees of the appointment of a new head of the Unit. The letter was circulated to a far wider audience than could conceivably be justified. In fact, only two of the companies that received the letter had active business with UNCC and therefore a legitimate interest in receiving this information. The circulation of such a letter, combined with the manner in which the Applicant was escorted off the premises, tarnished the Applicant's image and reputation. In this context, the Tribunal notes the Applicant's statement, indicating that he had been told by colleagues from his profession that they would never be able to employ him in Switzerland.

The Tribunal in Judgement No. 1009, *Makil* (2001), para. XV stated that:

> "The Tribunal considers that in the light of the legitimate decision of the Executive Director not to inform fellow staff as to the reason why the Applicant had been placed on SLWFP, that to have expelled him from the premises in the manner in which it was done, when combined with the decision not to give a reason was likely to cause people to believe that his honesty was being impugned or that he was being excluded from his office so as to prevent him from altering or destroying evidence. The Tribunal accepts that rumours very hurtful to the Applicant were likely to have circulated and that the act of expelling him from his office in the manner in which it was done added fuel to the flames. The Tribunal considers that nominal damages may be an appropriate measure of compensation when there has been a mere technical breach of a right but where no actual damage has been inflicted. The Tribunal considers that a more appropriate measure of compensation in relation to the Applicant's claim ... is necessary".

The Tribunal finds that the circumstances of the present case warrant similar consideration regarding compensation of the Applicant and accordingly concludes that the Applicant must be compensated for the injury he suffered.

VII. In view of the foregoing, and having considered the pleas and the record, the Tribunal:

1. Orders the Respondent to pay the Applicant, as compensation for his injury, the sum of US$ 12,000;

2. Rejects all other pleas.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha A. ECHOLS
Member

Omer Yousif BIREEDO
Member

Geneva, 23 July 2002

Maritza STRUYVENBERG
Executive Secretary